No. 17-647

In The
Supreme Court of the United States

ROSE MARY KNICK,
Petitioner,

v.

TOWNSHIP OF SCOTT; CARL S. FERRARO,
Individually and in his Official Capacity as Scott Township Code Enforcement Officer,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court. *See Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment).

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OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals is reported at *Knick v. Township of Scott*, 862 F.3d 310 (3d Cir. 2017). It is attached to the Petition as Petition Appendix (Pet. App.) A. The decision of the district court is unpublished. It is attached to the Petition as Appendix B.

JURISDICTION

The lower courts had jurisdiction over this case under 28 U.S.C. § 1331, 42 U.S.C. § 1983, and the Fifth Amendment to the United States Constitution. The Court of Appeals for the Third Circuit entered final judgment on July 6, 2017. Pet. App. C. The Petition for Certiorari was timely filed on October 31, 2017, after an extension of time up to and including November 1, 2017. The Court granted the Petition on March 5, 2018. It has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

INTRODUCTION

The central issue in this case is whether American property owners like Petitioner Rose Mary Knick (Ms. Knick) are entitled to a realistic and fair opportunity to seek compensation for a "taking" of property within the meaning of the Fifth Amendment. As it stands now, they have no such opportunity due to the ripeness doctrine set out in *Williamson County*

Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-96 (1985). Under that decision, property owners cannot hold the government liable for a taking of property in federal court until they exhaust state court remedies. *Id.* In application, this rule bars citizens from vindicating their constitutional property rights in federal courts and strips them of reasonable access to state courts. In this case, *Williamson County*'s state litigation requirement prevented the district court from hearing Ms. Knick's claim that the Township of Scott (Township) took her property when it gave members of the public and Township officials a right to physically occupy her land. Pet. App. A at 32; *see generally, Nollan v. California Coastal Comm'n*, 483 U.S 825, 831 (1987).

The dispute traces to the Township's enactment of an ordinance (Ordinance) that allows Township officials and the public to access any private land containing a burial ground of any size. The Township decided that this law applies to Ms. Knick, a single woman who owns and lives on 90 acres of private farmland. Pet. App. A at 3-4. After searching her land, it commanded her to open it to daily public access—originating from some undefined point along the nearest public road—and to allow people to intrude 300 yards into her property to reach an area the Township identified as a small gravesite. Joint Appendix (JA) at 10, 97, 110-12.

When Ms. Knick asserted below that the Ordinance's property access requirements cause a compensable taking, the Third Circuit Court of Appeals agreed that the Ordinance is "extraordinary"

and "constitutionally suspect." Pet. App. A at 3. Yet, it held that, under *Williamson County*, the district court could not rule on whether the law caused a taking warranting compensation until Ms. Knick sought compensation in Pennsylvania state courts. *Id.* This was wrong. Contrary to the dicta in *Williamson County*, the existence of a state damages remedy has no bearing on the ripeness of a federal takings claim, and property owners need not exhaust state remedies before litigating a crystalized takings controversy like this one.

STATEMENT OF THE CASE

A. Factual Background

1. The Setting and Ms. Knick's Property

The Township of Scott is a small community located in Lackawanna County, Pennsylvania, a rural area in the eastern part of the state. The Township lies approximately twenty miles to the north of Scranton, Pennsylvania. It is common to find private, family gravesites in the area because Pennsylvania state law allows so-called "backyard burials;" the practice of burying the deceased on private property. *See* Patricia E. Salkin, *Zoning and Land Use Planning*, 39 Real Est. L.J. 526, 530 (Spring 2011); *see also* Craig Smith, *Home burial on legislators' radar; Meyersdale plans vote*, TribLive, Apr. 5, 2014, http://triblive.com/state/pennsylvania/5788717-74/burial-funeral-property (noting "[t]he practice of tending to one's dead is not new, as evidenced by the number of centuries-old burial sites with time-worn tombstones on private properties throughout Western Pennsylvania"). As the Township explained in a

district court hearing, the area "goes back several hundred years in terms of families and burial plots. So while these may not be . . . sprawling cemeteries, you will have small plots that families have maintained for years." JA at 115.

Ms. Knick and her family have owned 90 acres of land in the Township since 1970. The property, located at 49 Country Club Road, Scott Township,[1] JA at 94, ¶ 7, is bisected by a two-lane country road. *Id.* Ms. Knick values her privacy and safety, and her land is accordingly bounded on all sides by stonewalls, fences, and similar monuments. *Id.* ¶ 8. Signs stating "No Trespassing" exist at regular intervals along the boundary. *Id.*

Ms. Knick lives on the property in a single-family residence. JA at 94, ¶ 7. The remaining land is used as a grazing area for horses and other animals. *Id.* There is no public cemetery or public access easement on the land. Ms. Knick has never authorized the public or government agents to cross or otherwise use her land. JA at 95, ¶ 12.

In 2008, Scott Township officials discussed an alleged burial ground on Ms. Knick's property, in apparent response to a public inquiry. JA at 95, ¶ 10. In the following period, Ms. Knick informed the Township that the title to her property does not include a reference to a burial ground. After additional research, she also informed the Township that there is no official state registration or documentation of a cemetery. Knick also told the

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[1] In 2008, Ms. Knick's sister deeded her interest in the property to Ms. Knick, leaving Ms. Knick as sole owner. JA at 150.

Township that she was not aware of any physical proof of a burial ground. *Id.* ¶ 11.

2. The Challenged Cemetery Ordinance

In December of 2012, the Township enacted a new law, Ordinance 12-12-20-001, pertaining to the existence, operation, and maintenance of cemeteries. JA at 96, ¶ 14; JA at 20-24 (Ordinance). Two of the Ordinance's provisions are relevant here.

Section 5 requires that "[a]ll cemeteries . . . shall be kept open and accessible to the general public during daylight hours." JA at 22. This provision applies to "[a]ll cemeteries, whether private or public, and whether existing or established prior to the . . . Ordinance." JA at 21. A "cemetery" is defined as "[a] place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings." *Id.*

In the district court, the Township explained that section 5 creates a public "easement" from the nearest public road to any cemetery lying on private land. JA at 126; *id.* at 119. The provision "is written to apply to all property owners in Scott Township across the board . . . if there's a cemetery—." JA at 115. The Ordinance does not define the boundaries of the easement imposed on affected properties. JA at 119. Nor does it "limit who specifically should be permitted on" this public right-of-way, JA at 127, the frequency with which people may come and go, or the type of activities they may engage in. The Ordinance does not offer protection for property owners from any liability that may arise from public use of their property.

Section 6 of the Ordinance similarly authorizes the Township's "code enforcement" agents to "*enter upon any property* within the Township for the purposes of determining the existence of and location of any cemetery . . . ." JA at 22 (emphasis added). There is no limit on the number of instances the agents can enter the property, the point at which they can enter or leave, or the amount of time they can stay.

The Ordinance authorizes fines of $300-$600 for every violation of its provisions, plus all court costs, including attorney fees. Each day that a violation exists is deemed a separate offense. JA at 23.

3. Enforcement of the Ordinance Against Ms. Knick

On April 10, 2013, after enactment of the Ordinance, the Township's Code Enforcement Officer entered Ms. Knick's land without her consent. JA at 97, ¶ 20. A day later, the Township issued a Notice of Violation to Ms. Knick informing her that an "inspection" of her land identified "[m]ultiple grave markers/ tombstones."[2] JA at 107-08. According to the Notice, "stones located on [the] property" constitute a "cemetery" subject to the Ordinance. *Id.*

The Notice goes on to declare that Ms. Knick is "in violation of section # 5 . . . which requires that all cemeteries within the Township shall be kept open and accessible to the general public during daylight

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[2] Ms. Knick's suit does not challenge the validity of the Township's burial ground determination, but takes issue with the property access requirements triggered by that determination.

hours." It orders her "to make access to the cemetery available to the public during daylight hours." JA at 108. The Township briefly rescinded this Notice after Ms. Knick filed a complaint in state court. However, a few months later, the Township issued a second, almost identical Notice of Violation to Ms. Knick. JA at 110-12. It too commands her to "make access to the cemetery available to the public" and threatens daily civil fines if she refuses to do so. *Id.* at 111-12.

B. Judicial Procedure

1. State Court Proceedings

After the Township issued the first Notice of Violation, Ms. Knick filed a Complaint in the Pennsylvania Court of Common Pleas. JA at 132-43. That complaint sought "Declaratory and Injunctive Relief from the Ordinance," in part on the basis that the law caused a taking of property. JA at 136-38. The Township subsequently agreed to withdraw its April 11, 2013, Notice of Violation and to stay enforcement of the Ordinance during the state proceedings. JA at 98, ¶ 24. However, the state court later declined to rule on Ms. Knick's complaint because it believed her claims would not be fit for a decision until the Township filed a separate civil enforcement action against Ms. Knick.[3] JA at 5; *id.* at 98-99, ¶ 25.

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[3] The Township has previously asserted that Ms. Knick's state court action is still "pending." This is true only in the sense that the suit is effectively stayed until the Township files a civil enforcement action, and it has not done that, leaving the case in an unresolvable posture over which Ms. Knick has no control.

2. Federal Procedure

At this point, Ms. Knick turned to the federal district court. There, she filed a complaint alleging that the Ordinance violated her rights under the Fourth Amendment and the Takings Clause of the Fifth Amendment. JA at 6-19. On October 28, 2015, the district court granted the Township's motion to dismiss Ms. Knick's First Amended Complaint. JA at 90-91. However, the court granted Ms. Knick leave to re-plead and clarify some claims, including her federal takings claims. *Id.*

Ms. Knick then filed a Second Amended Complaint. JA at 92-112. That complaint made clear that her federal takings claims consisted of facial and as-applied claims against the Ordinance's property access provisions. JA at 102-03. It alleges, in part, that "Scott Township enacted an ordinance—Ordinance 12-12-20-001—that violates the [T]akings Clause of the Fifth Amendment both on its face and as-applied because it authorizes a physical invasion and seizure of Plaintiff's private land." *Id.* at 92-93. It seeks "a Declaratory Judgment declaring [the] Ordinance unconstitutional, as well as "economic . . . [and] compensatory . . . damages." JA at 93.

On September 7, 2016, the district court issued an order dismissing all of Ms. Knick's takings claims as unripe under *Williamson County*. Pet. App. B at 11-18. The Court specifically held that Ms. Knick's claims would not be ready for a federal decision until she filed and finished a new, "inverse condemnation" suit in state court. *Id.* Ms. Knick timely appealed to the Third Circuit.

At the Third Circuit, Ms. Knick argued that her facial and as-applied takings claims are ripe. The Third Circuit disagreed, however. The court below concluded that this Court's precedent authorizes immediate federal review of a facial takings claim (*i.e.*, without prior state procedures) only if the claim rests on the now-defunct theory that a regulation "fails to substantially advance a legitimate state interest." Pet. App. A at 24-26. It reasoned that this was because such a claim does not invoke the principle of "just compensation." *Id.*

By the same token, the Third Circuit concluded that facial takings claims resting on existing physical and regulatory takings tests are subject to *Williamson County*'s state litigation requirement because they seek the remedy of just compensation. *Id.* at 24-27. It ultimately held that Ms. Knick's facial claim alleging that the Ordinance causes an immediate physical taking of property is unripe until she prosecutes another state court lawsuit. *Id.* at 27-28. The court below also held that Ms. Knick's as-applied claims would not ripen under *Williamson County* until she files and completes an inverse condemnation action in state court. *Id.* at 32.

Ms. Knick petitioned this Court to reconsider the *Williamson County* doctrine that has thus far barred her takings claims. On March 5, 2018, the Court granted the Petition.

SUMMARY OF ARGUMENT

The right to exclude others from private land is a fundamental and protected property right, the denial of which amounts to a taking requiring just

compensation. *Nollan*, 483 U.S at 831. In this case, the Township stripped Ms. Knick of her right to exclude strangers from her rural land by creating an easement on the property that allows regular public and governmental access to the land. JA at 22, 126. This encumbrance deprives her of privacy, endangers her safety, threatens to cause damage to her land and saddles her with potential civil liabilities. The burdens on her property amount to a compensable taking under a straightforward application of this Court's precedent, and Ms. Knick sued to establish that fact. *Dolan v. City of Tigard*, 512 U.S. 374, 384-85 (1994) ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use . . . a taking would have occurred.").

It is generally true, of course, that one may not hold the government accountable for a taking until the issue is ripe for a conclusive determination. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). Prior to the decision in *Williamson County*, this ripeness requirement meant that an owner could not claim a taking until the challenged government action causes a clear and final injury to property. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 346-47 (2005). This traditional "finality" ripeness regime is not challenged here.

Unfortunately, in dicta,[4] *Williamson County* added to the finality inquiry by creating an unprecedented and qualitatively different ripeness

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[4] *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 742 (2010) (Kennedy, J., concurring) (referring to "[t]his Court's dicta in *Williamson County*").

requirement. The *Williamson County* decision states that one claiming a taking of property cannot raise the claim in federal court until she has "unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." 473 U.S. at 195. *Williamson County* pointed to a state inverse condemnation action as an example of a state compensation procedure required for ripeness. *Id.* at 196

This was an unnecessary and counterproductive mistake. In practice, *Williamson County*'s state litigation ripeness requirement causes great harm to property owners, federal courts, and to the overall development of federal takings law. *San Remo Hotel*, 545 U.S. at 348-52 (Rehnquist, C.J., concurring); *Wayside Church v. Van Buren County*, 847 F.3d 812, 825 (6th Cir. 2017) (Kethledge, J., dissenting) ("[I]f anyone has undermined the adjudication of federal takings claims . . . it is the federal courts—by the application of *Williamson County*."). Though the requirement is framed as a means to ensure that takings claims arrive in federal courts in a ripe state, 473 U.S. at 185, it undermines this goal in application. *San Remo*, 545 U.S. at 351 (Rehnquist, C.J. concurring). Litigating for just compensation in state court does not ripen federal judicial review of a takings claim; it bars that review. This is because the state court action triggers claim and issue preclusion barriers at the federal court that prevent it from hearing a takings claim related to the prior suit. *San Remo*, 545 U.S at 342-45. While a takings claim may be "ripe" in federal court after a property owner litigates in state court under *Williamson County*, it is also dead on arrival due to preclusion rules. *Id.*; *see*

also Arrigoni Enters., LLC v. Town of Durham, 136 S. Ct. 1409, 1410 (2016) (Thomas, J., dissenting from denial of cert.) (*Williamson County* "dooms plaintiffs' efforts to obtain federal review of a federal constitutional claim.").

Williamson County's effect in closing off the federal courts to federal takings claims is contrary to *Williamson County*'s intent and irreconcilable with Congress's desire to create a federal forum for federal claims through 42 U.S.C. § 1983 and 28 U.S.C. § 1331. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 542-43 (1972) (confirming that federal courts have jurisdiction over federal property rights claims raised under 42 U.S.C. § 1983). But the requirement's harmful impacts do not stop there.

Since *Williamson County* bars federal adjudication of takings claims, property owners must file Fifth Amendment takings claims in state court or not at all. Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. Chi. L. Rev. 553, 605 (2012) ("State courts thus get first bite at these [takings] actions under *Williamson County*—and they get the only bite under *San Remo*."). Yet, including a federal claim in a state court complaint allows the government defendant to remove the case to a federal court under 28 U.S.C. § 1441. *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164 (1997). In the federal forum, the removed claim is unripe because removal prevented the plaintiff from completing the state litigation required by *Williamson County*. The removed takings claim instantly goes from ripe (in state court) to nonjusticiable (in federal court) and is subject to outright dismissal or remand

to state court. *Reahard v. Lee County*, 30 F.3d 1412, 1414 (11th Cir. 1994) (appellate court finds a removed takings claim unripe under *Williamson County* after the claim was fully litigated on the merits in the district court, nullifying a $700,000 compensatory award). In this scenario, *Williamson County* prevents takings litigation in federal *and* state court.

The jurisdictional pitfalls created by the state litigation requirement are sufficient to condemn the rule as an unworkable and unacceptable ripeness concept. But the doctrine is also deeply flawed at a theoretical level because it rests on an incorrect view of the role of the Just Compensation Clause in takings litigation. Contrary to *Williamson County*'s assumptions, a takings lawsuit does not rest on a violation of the "without just compensation" language in the Just Compensation Clause. 473 U.S at 195. It asserts that a government act must be recognized as a *de facto* taking, and that the Just Compensation Clause provides *a federal damages remedy* in that event. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S 304, 315-16 (1987). The Clause operates as a takings remedy, not as an element of a claim and, as a result, it does not bear on the question of whether a takings claim is fit for review. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984) (The "owner has a right to bring an 'inverse condemnation' suit . . . on the date of the intrusion[.]").

Williamson County's state litigation doctrine fails to serve a ripeness purpose, causes tremendous harm to takings litigation in application, and is inconsistent with the remedial role of the Just Compensation

Clause. For all these reasons, the Court should remove the doctrine and thereby restore the prior "final decision" ripeness regime. *See San Remo Hotel*, 545 U.S. at 348-52 (Rehnquist, C.J, concurring). Stare decisis policies do not counsel against this result; they favor it. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (abrogating "unworkable" and "poorly reasoned" rules serves the principles underlying the doctrine of stare decisis).

Under the traditional "finality" inquiry, compensation remedies are irrelevant to the ripeness determination. Physical and regulatory takings claims become ripe—in federal or state court—when the government carries out an act, or arrives at a definitive regulatory position, that causes clear injury to property rights. *Williamson County*, 473 U.S. at 192. Ms. Knick's takings claims are justiciable under this framework. The Township formally enacted the Ordinance more than five years ago. Its plain terms authorize public and local governmental access to any land with a burial ground, and the Township has made clear that these provisions apply to Ms. Knick's property. JA at 20-24.

The Township's demand that Ms. Knick open her land to the public causes immediate and serious harm to her constitutionally protected right to exclude strangers. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (The "right to exclude" is "a fundamental element of the property right."). Nothing more needs to occur before a court can apply this Court's physical takings precedent and declare that the Ordinance causes a taking requiring just compensation. *Nollan*, 483 U.S at 842 ("[I]f [the state]

wants an easement . . . it must pay for it."); *Kaiser Aetna*, 444 U.S at 180. When this occurs, the Township may rescind the Ordinance's access provisions to minimize its compensatory duty or pay full compensation to sustain the Ordinance as written. *First English*, 482 U.S at 321. In all events, Ms. Knick is entitled to a hearing on the merits of her takings claims.

ARGUMENT

I

WILLIAMSON COUNTY'S STATE LITIGATION REQUIREMENT IS UNWORKABLE IN PRACTICE AND INCONSISTENT WITH THE REMEDIAL NATURE OF THE JUST COMPENSATION CLAUSE

A. Background Takings Law

1. Condemnation and Inverse Condemnation

The Fifth Amendment to the Constitution provides: "nor shall private property be taken for public use, without just compensation." This amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 315; *Eastern Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring) (The Clause permits "the government to do what it wants so long as it pays the charge.").

A taking of private property may occur, within the meaning of the Fifth Amendment, in several different

ways. *See Kirby*, 467 U.S. at 4-5. The most straightforward situation occurs when the government institutes eminent domain proceedings in a court of law. In such proceedings, the government declares its intent to take property and deposits funds to guarantee payment of just compensation. *See Kirby*, 467 U.S. at 4-5; 40 U.S.C. § 3114(a). Assuming the validity of the public use, the only disputed issues relate to how and when the affected owner will receive just compensation. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 374-75 (1945) (in the eminent domain context, "the problem involved is the ascertainment of the just compensation required by the Fifth Amendment"); 40 U.S.C. § 3114(c)(1) ("Compensation shall be determined and awarded in the proceeding and established by judgment."). In these cases, the Just Compensation Clause functions predominately as a condition on the government's power to complete eminent domain proceedings. A taking is final and legitimate when the owner receives adequate compensation. *Danforth v. United States*, 308 U.S. 271, 284-85 (1939) ("[T]itle does not pass until compensation has been ascertained and paid . . . ."); *First English*, 482 U.S at 320 (in "condemnation proceedings[,] a taking does not occur until compensation is determined and paid").

The same is true in a quasi-condemnation case, where a legislative body "enacts a statute appropriating the property . . . [while] setting up a special procedure for ascertaining, after the appropriation, the compensation due to the owners." *Kirby*, 467 U.S. at 5; *see also Sweet v. Rechel*, 159 U.S. 380, 399 (1895) ("[I]t is a condition precedent to the exercise of [the taking] power that the statute

[authorizing a taking] make provision for reasonable compensation."). In such cases, takings liability is undisputed. The essence of a "takings" claim in this scenario is that the government has failed to comply with its admitted compensatory duties. *See Cherokee Nation v. S. Kansas Ry. Co.*, 135 U.S. 641, 659 (1890).

2. Inverse Condemnation Takings Claims Concern Liability; The Just Compensation Clause Provides a Remedy

The government can also take property without using a formal condemnation procedure. It can do so, for instance, through administrative and legislative acts that, while not explicitly designed to appropriate property, cause an impact creating a taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-42 (2005). Regulatory action causes a *per se* taking when it authorizes a "physical invasion" of property, *id.* at 538, such as through imposition of an easement. *Kaiser Aetna*, 444 U.S. at 180 ("[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation.").

When a property owner believes that an intrusion into her property, or a restriction on its use, causes a taking, the owner is entitled to sue in an "inverse condemnation" action to establish the existence of a taking. *Kirby*, 467 U.S. at 5; *United States v. Clarke*, 445 U.S. 253, 257 (1980) ("The phrase 'inverse condemnation' . . . [is] a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.").

In such a suit, the central allegation is that the government is liable for a "taking" in a constitutional sense: "The issue is not the same in condemnation cases and in inverse condemnation cases. In condemnation cases the issue is damages: How much is due the landowner as just compensation? In inverse condemnation the issue is liability: Has the government's action effected a taking of the landowner's property?" *Am. Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364, 369 (9th Cir. 1981); *Henderson v. City of Columbus*, 827 N.W.2d 486, 489 (Neb. 2013) ("[T]he initial question is whether the governmental entity's actions constituted the taking or damaging of property for public use.").

In inverse condemnation cases, the Just Compensation Clause supplies a damages remedy once a court finds that a government act amounts to a taking. *First English*, 482 U.S. at 315-16; *Murr v. Wisconsin*, 137 S. Ct. 1933, 1951 (2017) (Roberts, C.J., dissenting) ("[I]f 'private property' has been 'taken,' the last item of business is to calculate the 'just compensation' the owner is due."). The Clause guarantees indemnification in the event the government takes property without formally condemning it. *Id.*; *see also Monongahela Nav. Co. v. United States*, 148 U.S. 312 (1893). In *First English*, the Court sharply confirmed this remedial reading. There, the United States argued that the Just Compensation Clause "is only a limitation on the power of the Government to act, not a remedial provision" authorizing "money damages." 482 U.S. at 316 n.9. The Court rejected this interpretation, holding that the Clause requires a "compensation remedy" "in the event of a taking." *Id.* at 316.

In short, an inverse condemnation suit challenging an injury to property seeks to establish a right to the damages remedy supplied by the Just Compensation Clause by establishing the existence of a taking. *Id.*

B. Takings Ripeness Doctrine

1. Finality Rules Controlled Prior to *Williamson County*'s Articulation of the State Litigation Doctrine

This Court has made clear that courts cannot adjudicate inverse condemnation takings claims until it is plain the claims are ripe for review. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 735-38 (1997) (reviewing cases). The "basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). It is "also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.*

The Court has implemented these polices in the takings context by requiring plaintiffs to refrain from asserting a claim until a governmental action limiting property rights is concrete and final. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (holding that a property owner had to pursue "administrative solutions" that might reduce the impact of property restrictions to ripen a takings claim); *San Remo Hotel*, 545 U.S. at 346-47 ("It was

settled well before *Williamson County*" that a regulatory takings claim "'is not ripe until the government entity charged with implementing the regulations has reached a final decision[.]'" (quoting *Williamson County*, 473 U.S. at 186)).

In *Williamson County*, the Court confirmed and elaborated on the finality ripeness doctrine. The case arose when a developer asserted that land use regulations took its property by temporarily depriving it of economically viable use. 473 U.S. at 186-90. A jury found the defendant liable for a taking and awarded monetary compensation to the developer. The Sixth Circuit upheld the jury decision on appeal. This Court subsequently granted certiorari to decide "whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." *Id.* at 185. Yet, the Court concluded that it could not reach that issue because the underlying takings claims were unripe. *Id.*

In addressing the ripeness issue, the *Williamson County* Court reiterated that a regulatory takings claim is premature until the government reaches a "final decision" applying its regulations to the plaintiff's property. *Id.* at 186-94. The Court explained that, to obtain a final agency decision, a claimant must normally pursue any discretionary procedure within the regulatory scheme that might allow the government to soften the challenged regulations. *Id.* at 191-92.

However, the Court emphasized that finality ripeness doctrine does not require a takings claimant to exhaust state remedies:

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy . . . .

473 U.S at 192-93. The Court ultimately held that the takings claimant in *Williamson County* had not obtained a final agency decision because it had not applied for variances that might have allowed the defendant to permit more use of the subject property. *Id.* at 191.

Under the traditional finality concepts affirmed in the initial portion of *Williamson County*, state takings remedies are not pertinent to the determination of whether a takings claim is ripe. 473 U.S at 192-93; *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993, 997-99 (1st Cir. 1983) (rejecting an argument that the takings claimant had to use "their local remedies, judicial and administrative," because "there is no requirement of exhaustion of administrative remedies in section 1983 actions."); *Foster v. City of Detroit*, 405 F.2d 138, 144 (6th Cir. 1968) (holding, in a takings case, that "a party may normally resort to a federal court without having first exhausted the judicial remedies of the state courts'" (quoting 1A James Wm. Moore, et al., Moore's Federal Practice, P0.201, p. 2023 (1961))); *Archer Gardens, Ltd. v.*

Brooklyn Ctr. Dev. Corp., 468 F. Supp. 609, 613 (S.D.N.Y. 1979) (holding a takings claimant did not need to exhaust state remedies). If a government agency makes a formal and final decision harming property, the owner may sue to establish that it is a taking warranting a compensation remedy under the Just Compensation Clause. *Kirby*, 467 U.S. at 5.

2. *Williamson County*'s State Litigation Dicta

The Court's application of the final decision rule to the claim in *Williamson County* should have ended the case. Yet, in dicta, and without adequate briefing from the parties,[5] the *Williamson County* Court went on to articulate a second, novel ripeness barrier: the state litigation requirement.

The Court started with the observation that the Just Compensation Clause "proscribes" takings "without just compensation." 473 U.S. at 194. From there, it proposed that the Clause does not "require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Id.* (citations omitted). This led the Court to conclude that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Id.* at

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[5] *See* Brief Amicus Curiae of Western Manufactured Housing Communities Association at 5-8 (discussing the nature of party briefing in *Williamson County* and the Solicitor General's introduction of the ripeness issue in an amicus brief).

194-95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 n.21 (1984)). This ultimately meant "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. The Court held that the claim in *Williamson County* was unripe under the new principle because the plaintiff had not filed an inverse condemnation suit—a judicial action—under Tennessee law in Tennessee state court. *Id.*

In *San Remo*, the Court treated *Williamson County*'s second ripeness requirement as a command that property owners seek compensation through state court litigation. *San Remo Hotel*, 545 U.S. at 342; *id.* at 349 (Rehnquist, C.J., concurring). At the same time, four Justices of the Court criticized the principle and suggested it should be overruled. 545 U.S. at 349 (Rehnquist, C.J., concurring). They were correct.

C. The State Litigation Requirement Is Incapable of Coherent and Just Application

The *Williamson County* Court apparently believed that adding the state litigation requirement to the pre-existing "final decision" ripeness inquiry would render takings claims fully mature for review in federal court. 473 U.S. at 197. But after more than 30 years in application, it is clear it does no such thing. In practice, the requirement entirely bars takings litigants from federal court, frustrates their access to state court, and generally turns an attempt to establish a compensable taking into a chaotic, self-

defeating, and wasteful endeavor. *San Remo Hotel*, 545 U.S. at 350-52 (Rehnquist, C.J., concurring). It should not continue to exist.

1. The State Litigation Rule Ripens Nothing, but Instead Strips Federal Courts of the Ability To Hear Takings Claims

The state litigation doctrine's most startling effect is to ban property owners from asserting their federal constitutional rights in federal court. This outcome arises from the interplay between a plaintiff's compliance with *Williamson County*'s state litigation rule and the Full Faith and Credit Act. On the one hand, *Williamson County* declares that property owners may claim a taking in federal court after a state court denies them compensation. 473 U.S. at 194-96. On the other hand, res judicata and issue preclusion rules arising from the Act prevent federal courts from hearing a case related to a previously litigated dispute. *McDonald v. City of West Branch*, 466 U.S. 284, 287 (1984); *San Remo*, 545 U.S. at 336 & n.16.

The result is that, when a property owner unsuccessfully pursues a claim for compensation in state court to comply with *Williamson County*, the claim is *barred* from federal court, not ripened. *See San Remo*, 545 U.S. at 346-47; *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of cert.); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 519-20 (6th Cir. 2004); *Trafalgar Corp. v. Miami County Bd. of Comm'rs*, 519 F.3d 285, 287 (6th Cir. 2008) (Because "the issue of just compensation under the Takings clause . . . was directly decided in a previous state

court action, it cannot be re-litigated in federal district court.").

> Although the *Williamson* line of cases that requires the property owner to seek compensation in the state courts speaks in terms of "exhaustion" of remedies, that is a misnomer. For if . . . the property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit . . . by virtue of the doctrine of res judicata . . . .

Rockstead v. City of Crystal Lake, 486 F.3d 963, 968 (7th Cir. 2007); *see also W.J.F. Realty Corp. v. Town of Southampton*, 220 F. Supp. 2d 140, 146 (E.D.N.Y. 2002).

In application, the state litigation rule does the opposite of what *Williamson County* claims it will do. *DLX*, 381 F.3d at 518 n.3 (*Williamson County* "clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court."). Utilization of state compensation procedures prevents, rather than secures, federal jurisdiction over takings claims. Given this outcome, lower courts have aptly described *Williamson County*'s doctrine as a "catch-22,"[6] and a "trap."[7] The doctrine lures property owners to file state court suits that defeat, rather than ripen, federal review of their takings

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[6] *Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 127 (2d Cir. 2003).

[7] *DLX*, 381 F.3d at 518 n.3 (referring to the "*Williamson* trap" created in connection with res judicata); *see also* Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse In Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 103 (2000).

claims. "Like a tomato that suffers vine rot, [the claim] goes from being green to mushy red overnight. It can never be eaten."[8]

In the 2005 *San Remo Hotel* case, the Court considered the conflict between the state litigation requirement and preclusion doctrines. The Court recognized that takings claims "ripened" through state court litigation normally cannot be raised in federal court, contrary to *Williamson County*'s intent and language, due to preclusion rules. 545 U.S. at 346-47. Nevertheless, the *San Remo Hotel* Court refused to create an exception from these preclusion rules, such as one that would allow takings plaintiffs to "reserve" (protect) their federal claim for federal review while litigating in state court. The Court also refused to overrule the state litigation rule because that question was not properly presented. *Id.* at 352 (Rehnquist, C.J., concurring).

San Remo Hotel thereby solidified *Williamson County*'s state litigation ripeness doctrine as a complete barrier to prosecution of federal takings claims in federal court. 545 U.S. at 349-52 (Rehnquist, C.J., concurring). There is no indication that the *Williamson County* Court intended to foreclose federal judicial review of takings claims, *DLX*, 381 F.3d at 518, and yet, that is the inevitable and ongoing result of the state litigation doctrine. *Foster v. Minnesota*, No. 17-1177, 2018 WL 1881609, at *2 (8th Cir. Apr. 20, 2018) ("When a property owner has unsuccessfully

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[8] Thomas Roberts, *Ripeness and Forum Selection in Land-Use Litigation, in Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas* 68 (ABA, Callies ed., 1996).

asserted a Fifth Amendment takings claim in state court, as Foster did . . . her later assertion of the same claim in federal court is precluded . . . .").

2. The State Litigation Doctrine Is Inconsistent With 42 U.S.C. § 1983 and 28 U.S.C. § 1331

It is impossible to reconcile *Williamson County*'s relegation of takings claims to state courts with Congress's intent to provide a federal forum for federal civil rights claims under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. *See* 28 U.S.C. § 1343(a)(3). This Court has repeatedly emphasized that the "purpose [of enacting § 1983] was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . ." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *see also Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 504 (1982) ("Congress intended . . . to throw open the doors of the United States courts to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, and to provide these individuals immediate access to the federal courts . . . ." (quotations & citations omitted)). Neither Congress nor this Court has ever carved out an exception from these federal jurisdictional grants for takings claimants or property owners more generally. *Lynch*, 405 U.S. at 542-43 ("This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343(3) jurisdiction.").

By denying a federal forum to property owners claiming a "taking" of property under the Fifth Amendment, the *Williamson County* doctrine

radically departs from the congressionally mandated framework for litigating constitutional rights. John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 Conn. L. Rev. 723, 726 (Feb. 2008) (requiring state exhaustion represents "a marked change from past practice" in which "the federal government assumed primary responsibility for the enforcement of civil rights"). While one may not have a right to a federal forum after filing a prior, similar suit in state court, *San Remo Hotel*, 545 U.S. at 347, the idea that an entire class of constitutional plaintiffs can be shut out of federal courts in the first instance is unknown to constitutional doctrine. *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (Section 1983 affords "a federal right in federal courts."); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 65 (1928) (After passage of 28 U.S.C. § 1331, federal courts "became the primary and powerful reliances for vindicating every right given by the Constitution, laws, and treaties of the United States.").

No other type of constitutional plaintiff faces such a stern barrier to federal court access. *Arrigoni*, 136 S. Ct. at 1411. While some plaintiffs may face hurdles similar to *Williamson County*'s initial, "final decision" requirement, none confront a broadly applicable exhaustion of state remedies requirement that prevents access to federal courts. *See Zinermon v. Burch*, 494 U.S. 113, 124-39 (1990) (state remedies may be required only in the rare procedural due process case where it is not feasible for the government to provide pre-deprivation process); *DLX, Inc.*, 381 F.3d at 521 ("[O]ther § 1983 plaintiffs do not have the requirement of filing prior state-court

actions . . . ."). This confirms the unusual nature of the state litigation rule and gives substance to the recurring complaint that *Williamson County* reduces property owners to second-class citizens in the protection of their rights. *San Remo Hotel*, 545 U.S at 351 (Rehnquist, C.J., concurring) (questioning "why federal takings claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive"); *see also* Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307, 332-33 (1998) (The *Williamson County* doctrine shows the "constitutional rights of landowners as not quite deserving of a full measure of judicial protection, on par with other constitutional rights.").[9]

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[9] The status of federal courts is also diminished by application of the state litigation rule, as it renders them subservient to state courts in the development of Fifth Amendment takings law. This too is inconsistent with long-standing precedent. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 284-85 (1913) (rejecting an argument that federal courts cannot decide a due process property deprivation claim until state courts act, in part because it would "cause the state courts to become the primary source for applying and enforcing the constitution of the United States in all cases covered by the [Fourteenth] Amendment"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344-50 (1816) (defending primacy of federal review of constitutional issues to avoid state court bias and to ensure uniformity of decision making).

3. The State Litigation Requirement Deprives Takings Plaintiffs of Reasonable Access to State Courts

In *San Remo Hotel*, the Court seemed to believe that takings claimants at least have prompt access to state courts under *Williamson County*'s state litigation doctrine. *San Remo Hotel*, 545 U.S. at 346. But, in practice, this is not true. State court access is also often illusory due to a conflict between compliance with the state litigation rule and the government's right to remove certain state court cases to federal court under 28 U.S.C. § 1441. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.).

Since property owners cannot file a Fifth Amendment takings claim in federal court as an initial matter under *Williamson County*, and cannot sue in that forum after a failed state court proceeding due to preclusion rules, they are forced to file Fifth Amendment claims in state court or not at all. *Rockstead*, 486 F.3d at 968. Yet, doing so sets the case up to be removed to federal court under 28 U.S.C. § 1441 on the basis that it raises a "federal question." *International College of Surgeons*, 522 U.S. at 164 (affirming removal of a complaint including a takings claim). Filing a federal takings claim in state court allows the government to drag it right back to federal court, where the claim is unripe under *Williamson County* because state compensation procedures remain unexhausted. A properly filed and ripe state court takings claim instantly becomes unripe due to a defendant's unilateral choice to remove. *8679 Trout, LLC v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-cv-01569,

2010 WL 3521952, at *5-6 (E.D. Cal. Sept. 8, 2010) ("Although the claim was ripe when it was originally filed in state court, it became unripe the moment that Defendants removed it.").

When federal courts confront a removed takings claim, they are often compelled to dismiss the claim as unripe for lack of compliance with *Williamson County*'s state litigation requirement. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006) (affirming dismissal of a removed takings claim for failure to exhaust state court procedures); *Clifty Properties, LLC v. City of Somerset*, No. 6:17-41, 2017 WL 4003024 (E.D. Ky. Sept. 11, 2017) (a takings claim is removed twice and dismissed twice under *Williamson County*).[10] The removed takings plaintiff is thus left without reasonable access to either the state *or* federal forum. The takings claim cannot be raised as an initial matter in federal court, it cannot be adjudicated in state court because of removal, and it cannot be litigated in federal court after removal due to *Williamson County*. This outcome is striking—and emblematic of the state litigation doctrine's wholly unworkable character—because it arises from perfect compliance with the doctrine. By filing in state court, the takings plaintiff did exactly what is required to secure a hearing on a takings claim. *San Remo Hotel*, 545 U.S. at 346. Yet, through

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[10] *See also Seiler v. Charter Tp. of Northville*, 53 F. Supp. 2d 957, 962 (E.D. Mich. 1999); *Anderson v. Chamberlain*, 134 F. Supp. 2d 156 (D. Mass. 2001) (federal nature of takings claim justified removal but state litigation ripeness rule compelled subsequent refusal to hear the claim).

no fault of the plaintiff, the claim instantly goes from alive to dead based on a defendant's choice to remove. *Doak Homes, Inc. v. City of Tukwila*, No. C07-1148MJP, 2008 WL 191205, at *4 (W.D. Wash. Jan. 18, 2008) ("Defendants' decision to remove this case from state court effectively denied [the plaintiff] an opportunity to utilize [the state's] procedure for reimbursement, and brought a takings claim to this Court that was not ripe for review.").[11]

In recent years, a few federal circuit courts have held that a defendant waives *Williamson County*'s state litigation rule when removing a takings claim from state to federal court. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 545-48 (4th Cir. 2013); *Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014). But, after shuffling takings claims between state and federal courts for 33 years under *Williamson County*, with judicial and litigant resources wasted

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[11] It is true that some federal courts will remand a removed takings claim to state court, rather than dismiss it, upon finding the claim unripe under *Williamson County*. *Del-Prairie Stock Farm v. County of Walworth*, 572 F. Supp. 2d 1031, 1034 (E.D. Wis. 2008). This outcome is of little solace to the plaintiff. That removed and remanded litigant has been involuntarily yanked from the state court—which is supposedly the only proper forum for a takings claim—to a federal court—which is not a proper forum—only to be sent back to the state court where it all began, without any hearing in the process. Through it all, valuable resources and time are wasted, allowing government defendants to prevail by attrition. *Cf. Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005) ("The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources.").

and claims disappearing along the way, this bit of progress is not enough.

Courts have tried for decades to apply the state litigation requirement in a rational and predictable fashion, and failed. *Arrigoni*, 136 S. Ct. at 1411-12. At this point, it is abundantly clear that *Williamson County*'s state litigation requirement does not serve a ripeness purpose or any other useful purpose in application. Instead, it demeans and diminishes rights protected by the Takings Clause, wrongly frustrates the federal courts' congressionally mandated authority to review civil rights claims, and impedes the orderly development of takings law. *See generally* Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 Tex. L. Rev. 199 (2006).

D. The State Litigation Requirement Fails To Account for the Just Compensation Clause Remedy

The state litigation requirement is not only unworkable, it suffers from significant logical flaws. *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring). In particular, it fails to account for the remedial character of the Just Compensation Clause and conflates the issues in a traditional condemnation case with those in an inverse condemnation takings case.

At the core of *Williamson County*'s reasoning is the assumption that a takings claim asserts a "violation" of the Just Compensation Clause. The

Court stated this assumption early in the *Williamson County* opinion when it noted that it would "examine the posture of respondent's cause of action . . . by viewing it as stating a claim under the Just Compensation Clause." 473 U.S. at 186. Focusing on the Clause's "without just compensation" language, the Court subsequently concluded that "no constitutional violation occurs until just compensation has been denied." *Id.* at 194 n.13. This led the Court to hold that no actionable claim exists "until the State fails to provide adequate compensation for the taking." *Id.* at 195.

The critical flaw in this reasoning is that the Just Compensation Clause does not supply the cause of action when a property owner asserts a taking in an inverse condemnation action; *it supplies the remedy. First English*, 482 U.S. at 315-16, 321. The cause of action is that the government has carried out an act that must be treated as a taking. The claim is not that the injury to property "violated" the Just Compensation Clause's language, but that it entitles the property owner to a damages remedy under the Clause. *Id.*; 54 U.S.C. § 100735 (allowing mining claim holders to bring an inverse condemnation action "to recover just compensation, which shall be awarded *if the court finds that the loss constitutes a taking of property compensable under the Constitution*" (emphasis added)); *see also San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting); *Henderson*, 827 N.W.2d at 489 ("[A]fter it has been established that a compensable taking or damage has occurred [] consideration [should] be given to what damages were proximately caused by the taking.").

Contrary to *Williamson County*'s assumption, a takings claim does not assert that an injury to property is constitutionally invalid because it occurred "without just compensation." 473 U.S. at 194. It seeks to show that the injury is a taking "*requiring* [the remedy of] just compensation." *Lingle*, 544 U.S. at 537; *Hodel v. Irving*, 481 U.S. 704, 713 (1987); *see also Murr*, 137 S. Ct. at 1952 (Roberts, C.J., dissenting) ("[I]f a taking has occurred, the remaining matter is tabulating the 'just compensation' to which the property owner is entitled."). That is, at least in the inverse condemnation context, the Just Compensation Clause does not "proscribe" uncompensated takings; it provides a "self-executing" damages remedy once a court finds a taking. *First English*, 482 U.S. at 315; *id.* at 316 n.9; *Jacobs v. United States*, 290 U.S. 13, 16 (1933); *San Diego Gas & Elec. Co.*, 450 U.S. at 658 (Brennan, J., dissenting) ("[O]nce a court finds a police power regulation has effected a 'taking,' the government entity must pay just compensation" under the Just Compensation Clause.).

The flaws in *Williamson County*'s reasoning are put into further relief by considering the syllogism supporting the Court's reasoning:

> [A]ll that is required is that a "reasonable, certain and adequate provision for obtaining compensation" exist at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just

> compensation," then the property owner "has no claim against the Government."

473 U.S. at 194-95 (citations omitted).

This rationale makes some sense in a condemnation-type dispute where the government acknowledges it is taking property and that it has a resulting compensatory duty. *Kirby*, 467 U.S at 5. Such was the case in *Cherokee Nation*, from which the Court derived the foregoing logic. *Williamson County*, 473 U.S. at 194 (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974) (quoting *Cherokee Nation*, 135 U.S. at 659). In *Cherokee Nation*, the United States statutorily authorized a physical invasion of property, while providing a procedure in that same act for affected owners to obtain compensation for that taking. The Nation asserted that the taking was invalid because it had not been paid before the invasion of its property. The dispute accordingly centered on the provision of just compensation. The existence of a taking was not at issue. The Court held the Nation had no claim for a constitutional violation because the act authorizing the taking created an adequate process for it to "obtain" compensation. *Id.*

The same rationale is inapt when a dispute is about whether a taking has occurred in the first place and a property owner sues in an inverse condemnation action to litigate that issue. *First English*, 482 U.S. at 315-16; *see also Clarke*, 445 U.S. at 258. In these cases, the property owner has no right to just compensation—or to use an existing process for obtaining it—until the owner first proves that liability for a compensable taking exists. *First English*, 482

U.S at 316. *Williamson County* essentially holds that one must try to collect a compensatory debt before there is entitlement to it. 473 U.S at 195. That is wrong. The entitlement must first be established, and proof of that entitlement—not proof a violation of the Just Compensation Clause—is the essence of a takings claim. *See, e.g., Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 29 (2012) ("[T]he Commission filed the instant lawsuit . . . claiming that the temporary [flood-causing] deviations from the Manual constituted a taking of property that entitled the Commission to compensation."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) ("[T]he question [is] whether a minor but permanent physical occupation of an owner's property . . . constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments."); *San Diego Gas & Electric*, 450 U.S. at 660 (Brennan, J., dissenting) ("[T]he landowner must be able meaningfully to challenge a regulation that allegedly effects a 'taking,' and recover just compensation if it does so.").[12]

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[12] *Williamson County*'s failure to fully grasp this point is evident in its conclusion that one can ripen a federal takings suit by filing a state inverse condemnation action. Like inverse condemnation suits generally, a state inverse condemnation procedure is a process for proving *a taking* that warrants a damages remedy. *See* 26 Pa. Cons. Stat. § 502(c) (outlining Pennsylvania's inverse condemnation process); *Henderson*, 827 N.W.2d at 489. In essence, *Williamson County*'s doctrine declares that one must try and establish a taking (in a state inverse condemnation action) before asserting a taking (in a federal inverse condemnation action). This confirms that takings claims hinge on an allegation

Once the nature of an inverse condemnation takings action and the remedial role of the Just Compensation Clause is understood,[13] it is clear that the use of compensation procedures is not an element of a takings claim, as *Williamson County* presumed.[14] 473 U.S at 196. State compensation procedures are simply an *alternative remedy* to the Just Compensation Clause. As such, they do not play into

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that an act *causes a taking*, not that it occurred without a compensatory procedure.

[13] In the *Williamson County* Court's defense, the remedial nature of the Just Compensation Clause in regulatory takings cases was not established at the time of the decision. On two occasions before *Williamson County*, the Court tried to decide whether the Clause functions as a damages remedy, but found the issue unripe. *Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980); *San Diego Gas & Electric Co.*, 450 U.S. at 633. In *Williamson County*, the Court granted certiorari to address the issue but, of course, it failed to reach it, too. 473 U.S. at 185. The Court finally addressed the remedial question head-on in *First English*, two years after it issued the *Williamson County* opinion. 482 U.S. at 310-12. There, a majority confirmed that the Just Compensation Clause is a self-executing damages remedy in the inverse condemnation context. *Id.* at 315-16.

[14] Even if one accepts the *Williamson County* premise rejected here—that an inverse condemnation claim rests on a "violation" of the Just Compensation Clause—the state litigation ripeness requirement is not a correct deduction from this premise. Accepting the premise for the sake of argument, the issue of whether an alleged taking is "without just compensation" and "complete" would depend on the actions of the responsible government entity at the time of the taking, not on the actions of a state court. If an agency charged with taking property fails to provide or guarantee compensation at the time of the property injury challenged as a taking, the alleged taking would be "without just compensation." A claim would be complete and ripe for review at that point under *Williamson County*'s own logic, regardless of what a state court might do.

a property owner's ability to assert an actionable takings claim. *Horne v. Dep't of Agric.*, 569 U.S. 513, 526 n.6 (2013) ("[W]hether an alternative remedy exists does not affect the jurisdiction of the federal court" to hear an otherwise ripe takings claim.); *Zinermon*, 494 U.S. at 124 ("[O]verlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983."); Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979, 989-90 (1986) ("No authority supports use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked.").[15]

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[15] The *Williamson County* Court attempted to buttress the state litigation requirement by analogizing to *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), and *Parratt v. Taylor*, 451 U.S. 527 (1981). Yet, neither decision supports *Williamson County*'s logic. *San Remo*, 545 U.S. at 349 n.1 (Rehnquist, C.J., concurring). The claimant in *Monsanto* did not seek just compensation for a taking; it sought to enjoin a federal statute. In rejecting that relief, the Court did not find the claim unripe; it held it unavailable. Moreover, *Monsanto* did not rule that a property owner must exhaust some preliminary judicial process to ripen a takings claim seeking just compensation in the Court of Federal Claims. 467 U.S. at 1016-17. It held that an owner may directly file such a takings claim. *Id.*

Parratt held that a prisoner challenging a negligent loss of personal property could not state a procedural due process claim until he used available state post-deprivation remedies. 451 U.S. at 541. The Court reasoned that the asserted due process injury was not complete "unless or until the state fails to provide an adequate postdeprivation remedy for the property loss." *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984). *Parratt* applies only to "a random and unauthorized" deprivation of property, 451 U.S.

II

THE COURT SHOULD RECONFIRM THE PRE-*WILLIAMSON COUNTY* FINALITY RIPENESS FRAMEWORK AND HOLD MS. KNICK'S CLAIMS RIPE UNDER THAT REGIME

In light of the state litigation requirement's harmful impacts and flawed logic, the Court should abrogate the requirement and return takings ripeness doctrine to the framework that existed prior to *Williamson County*. *San Remo*, 545 U.S. at 348 (Rehnquist, C.J., concurring); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (A rule that is "not correct when it was decided, and it is not correct today . . . ought not to remain binding precedent.").

Abandoning the dysfunctional and illogical state litigation requirement does not leave property owners free to raise unripe takings claims. Takings claimants must still assert claims that are factually developed and nonspeculative. But the identification of ripe claims does not depend on whether the state has a general process for remedying a taking of private property. It depends on whether the government has

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at 541, for which the government cannot plausibly provide pre-deprivation process. It is accordingly inapplicable to deprivations of property arising from official policies or formal administrative actions, since pre-deprivation process can be provided in that context. *Id.*; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982). Since takings claims arise only from official policies and formal decision making, *Palazzolo*, 533 U.S. at 620, *Parratt*'s reasoning is inapposite to the takings context. The analogy to *Parratt* also fails because the Just Compensation Clause is remedial in nature, unlike the Due Process Clause construed in *Parratt*.

inflicted concrete harm to private property interests. *Blanchette v. Connecticut General Ins. Corporations*, 419 U.S. 102, 138-44 (1974); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990).

Ms. Knick's claims, which allege that the Ordinance effects a physical taking of private property on its face and as-applied to her particular parcel of land, are ripe under traditional and correct ripeness principles.

A. Takings Claims Ripen When the Government Clearly Injures Property Interests

In the absence of *Williamson County*'s state litigation doctrine, the ripeness inquiry in takings cases properly focuses on whether the issues relevant to takings *liability* are postured for review. 473 U.S. at 191 (explaining that the "final decision" ripeness requirement ensures that a court can apply regulatory takings tests to decide if a taking occurred); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."). The considerations relevant to determining whether the government has caused a taking are generally fit for review once the government arrives at "a definitive position" that inflicts "an actual, concrete injury" to property. *Williamson County*, 473 U.S. at 193; *Lujan*, 497 U.S. at 891.

Just compensation issues raise remedial concerns that do not affect the issue of takings liability or a court's ability to decide that question. *Tahoe-Sierra*

Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 n.17 (2002) ("In determining whether government action affecting property is an unconstitutional deprivation of ownership rights under the Just Compensation Clause, a court must interpret the word 'taken.'"); *Suitum*, 520 U.S. at 747 (Scalia, J., concurring) ("[A] cash payment from the government would not relate to whether the regulation 'goes too far' (*i.e.*, restricts use of the land so severely as to constitute a taking.")). Thus, when the government causes concrete harm to property without initiation of condemnation proceedings—whether through enactment of a law that burdens property or conclusive application of an existing regulation—an affected property owner may assert that the result is a compensable taking. *Horne*, 569 U.S. at 525; *Kirby*, 467 U.S. at 5 (The "owner has a right to bring an 'inverse condemnation' suit . . . on the date of the intrusion" into property.); *see also Clarke*, 445 U.S. at 258 ("When a taking occurs by physical invasion [as opposed to one by formal condemnation] . . . the usual rule is that the time of the invasion constitutes the act of taking, and '[i]t is that event which gives rise to the claim for compensation . . . .'" (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958))).

This injury-based ripeness inquiry may vary slightly depending on the type of alleged taking.[16] *See*

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[16] The ripeness inquiry may be more intensive when a case involves a regulatory takings claim. In this context, a "final agency decision" may not exist until the property owner exhausts administrative procedures that allow the government to clarify the scope and effect of its regulations. *Palazzolo*, 533 U.S. at 620. This rule arises from the nature of regulatory takings analysis.

generally Brubaker Amusement Co., Inc. v. United States, 304 F.3d 1349, 1357-59 (Fed. Cir. 2002) (summarizing finality ripeness rules). But in no case must the claimant prove that state remedies will not provide compensation before suing to establish a taking. "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe*, 365 U.S. at 183; *see also Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on [§ 1983] . . . we have not required exhaustion of state judicial or administrative remedies . . . ."); *Home Tel. & Tel. Co.*, 227 U.S. at 284-85.

B. Ms. Knick's Physical Takings Claims Are Ripe

Ms. Knick alleges that the Ordinance causes a taking of private property because it (1) allows "the general public to enter, traverse, and occupy [] private land," including her parcel, and (2) "authoriz[es] the Township's 'Code Enforcement Officer [and] agents'" to enter, traverse, and occupy any private property to look for a cemetery. JA at 102, ¶¶ 36-37. These requirements sanction an invasion of her land for public use and eviscerate her

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473 U.S at 192. A court cannot determine how far a regulation goes in restricting the use and value of property until the government uses its discretion to arrive at a definitive position on the application of its regulation. Once it does so, 533 U.S. at 620, or it becomes clear that the agency lacks discretion to soften the regulations, *Suitum*, 520 U.S. at 739, or "the permissible uses of the property are [otherwise] known to a reasonable degree of certainty," *Palazzolo*, 533 U.S. at 620, finality exists, and a regulatory takings claim is ripe.

"fundamental right to exclude others." *See* JA at 102, ¶ 39; *see generally Kaiser Aetna*, 444 U.S. at 180. Ms. Knick accordingly claims that the Ordinance causes a taking entitling her to "compensatory damages." JA at 103, ¶ 43. Under the correct analytical framework, these claims are ripe.

1. Ms. Knick's As-Applied Claims Are Ripe

A claim that regulatory action causes a compensable physical taking is ripe once the government determines that its regulations require an invasion of property.[17] *Blanchette*, 419 U.S. at 143 (takings claim ripe where "the conveyance [of [property] allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative"); *see also Horne*, 569 U.S. at 525 (claim ripened by a "final agency order imposing concrete fines and penalties" due to a property owner's refusal to convey property to the government).

Here, the Township conclusively decided that the Ordinance's property access provisions apply to Ms. Knick's land. JA at 111-12; *cf. Suitum*, 520 U.S. at 739 (claim ripe where a government agency decided the plaintiff's land was within a restricted development zone). The Township inspected (trespassed on) the property and then sent Ms. Knick written notification that her land contains a burial site subject to the Ordinance. JA at 110-12. The Notice declares that she is "in violation of section # 5 . . .

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[17] Unlike in the regulatory takings context, a property owner asserting a physical takings claim need not pursue administrative variances that might reduce the scope of an invasion, since a physical invasion of any size is a taking of property. *Tahoe-Sierra*, 535 U.S. at 322.

which requires that all cemeteries within the Township shall be kept open and accessible to the general public during daylight hours." JA at 110-11. Finally, it orders her "to make access to the cemetery available to the public during daylight hours." *Id.* at 111. It states that she is subject to civil penalties for every day she fails to comply with this public access order. *Id.* at 111-12.

The application of the Ordinance to Ms. Knick's property is sufficiently final and concrete to allow a court to decide whether it causes a physical taking of her property. *Horne*, 569 U.S. at 525. In the event the district court finds that the Ordinance renders the Township liable for a taking, "the compensation remedy [afforded by the Just Compensation Clause] is required," entitling Ms. Knick to damages for the duration of the taking.[18] *First English*, 482 U.S at 316.

2. Ms. Knick's Facial Claims Are Also Ripe

A claim asserting that a law or regulation takes private property on its face ripens at the time of enactment. *Hodel, Inc.*, 452 U.S. at 297; *Suitum*, 520 U.S. at 736 n.10; *Keystone Bituminous Coal Ass'n v.*

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[18] Ms. Knick's claims are ripe even if one concludes, as *Williamson County* wrongly does, that a claim ripens upon a "violation" of the "without just compensation" language in the Just Compensation Clause. This is because the Ordinance contains no provision for compensation, the Notices of Violation offer no compensation, and the Township took no other steps to guarantee compensation when it ordered Ms. Knick to open her land to the public. The Township's actions accordingly should be deemed "without just compensation" and actionable, without use of state procedures, even under *Williamson County*'s (incorrect) treatment of the "without just compensation" language as an element of a takings claim, rather than as a remedy.

DeBenedictis, 480 U.S. 470, 494 (1987). The logic is straightforward. When the government passes a law that plainly and immediately restricts property interests, the burden on property is apparent. There is nothing uncertain about the impact of such law. Without more, a court can determine if that impact rises to the level of a taking requiring compensation. While a plaintiff may face a "battle" to prevail in such a facial challenge, *Hodel*, 452 U.S. at 296-97, no principle of ripeness bars the claim.[19]

There is no dispute that the Township formally enacted the Ordinance six years ago, and it remains on the books today. The Ordinance requires that all private burial areas "shall be kept open and accessible to the general public during daylight hours." JA at 22. It further authorizes Township officials to "enter upon any property within the Township for the purposes of determining the existence of and location of any cemetery . . . ." *Id.*

There is also nothing speculative about these provisions. The Township acknowledges that the first provision creates a public access easement on all private property containing a burial ground. JA at 126. The second is a broad "authorization to conduct searches of privately owned property." Pet. App. A at 19-20. Ms. Knick's land is currently subject to these

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[19] If a court finds that a law causes a taking on its face, the initial remedy is a declaration to that effect. The government then has the option to amend or rescind the law or to pay compensation to affected property owners to retain the law. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (When an act "reaches a certain magnitude . . . there must be an exercise of eminent domain and compensation to sustain the act.").

access requirements, and thus, there is a clear injury to her property warranting legal action. *Blanchette*, 419 U.S. at 143.

Yet, as things stand now, Ms. Knick's only hope for a hearing is to wait for the Township to institute a state law civil enforcement action or to file a second, "inverse condemnation," action in state court.[20] In the meantime, under the threat of large, accumulating daily fines, Ms. Knick must allow anyone to enter her land, with no legal limits on where or how they enter or how long they remain and no way to determine if their presence is consistent with the Ordinance. JA at 126-27.

Ripeness doctrine does not demand this situation. Given the Township's decisive enactment and implementation of its Ordinance's access provisions, Ms. Knick has a ripe claim that the provisions effect a taking by depriving subject landowners of the fundamental right to exclude strangers. Ms. Knick need not utilize an alternative state compensation process before seeking (1) a declaration that the Township is taking property and must pay compensation to sustain the Ordinance and (2) damages under the Just Compensation Clause in the event the Township chooses to retain the

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[20] Notably, an inverse condemnation action in Pennsylvania state court would not raise different takings issues than those presented here. Such a suit would require the state court to apply this Court's takings precedent to decide if a taking occurred, the same task presented by Ms. Knick's federal complaint. The state court is not better suited to this job than a federal court. *San Remo Hotel*, 545 U.S. at 350-51 (Rehnquist, C.J., concurring). In any event, ripeness principles do require resort to state court. *See Horne*, 569 U.S. at 526 n.6.

Ordinance. *Horne*, 569 U.S. at 526 n.6; *see also First English*, 482 U.S. at 321.

C. Stare Decisis Does Not Bar the Court from Correcting Course

The Township will likely argue that the Court cannot reach the foregoing conclusions because the doctrine of stare decisis prevents it from abandoning *Williamson County*'s state litigation rule. It does not. Stare decisis is neither an "inexorable command," *Lawrence*, 539 U.S. at 577, nor "a mechanical formula of adherence to the latest decision," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). This is especially true when considering dicta. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (The Court is not "bound by dicta should more complete argument demonstrate that the dicta is not correct.").

Stare decisis also has less force when dealing with a constitutional rule, *see United States v. Scott*, 437 U.S. 82, 101 (1978), as it "is practically impossible" to correct such a rule by legislative action. *Payne*, 501 U.S. at 828 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932)). The doctrine is similarly weakened in the context of procedural rules, because such rules generate fewer reliance interests than substantive legal standards. *Alleyne v. United States*, 570 U.S. 99, 119 (2013) (stare decisis has less application with respect to "procedural rules . . . that do not govern primary conduct and do not implicate the reliance interests of private parties").

When a constitutional or procedural rule is erroneous and "unworkable," stare decisis concerns "carry little weight." *Federal Election Comm'n v.*

Wisconsin Right To Life, Inc., 551 U.S. 449, 501 (2007); *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965) ("[O]nce [a procedural rule] is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great."). Indeed, in such a situation, "[a]brogating the errant precedent, rather than reaffirming or extending it, [ ] better preserve[s] the law's coherence and curtails the precedent's disruptive effects." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 378-79 (2010) (Roberts, J., concurring).

The state litigation requirement is dicta that purports to be a constitutionally based procedural rule. *Cf United States v. Gaudin*, 515 U.S. 506, 521 (1995). It is mistaken in theory and unworkable in application. *Payne*, 501 U.S. at 828. Given its procedural nature and unpredictable application, the state litigation ripeness doctrine gives rise to few reliance interests. That some government defendants may hope to continue defeating takings claims through procedural attrition rather than on the merits is not the type of reliance concern that supports stare decisis. Nor is the mere fact that *Williamson County*'s state litigation principle has survived to date. *See, e.g., Lingle*, 544 U.S. at 544 (abrogating a 25-year-old takings standard due to its doctrinal flaws). In light of these realities, stare decisis cannot save the state litigation requirement. *Gaudin*, 515 U.S. at 521 ("[*S*]*tare decisis* cannot possibly be controlling" when considering a "manifestly erroneous," constitutionally based procedural rule.).

Abrogating the state litigation requirement to return ripeness doctrine to the pre-existing finality-based inquiry is the correct result. The Court should take that step. *Davis v. Mills*, 194 U.S. 451, 457 (1904) (The Constitution is "intended to preserve practical and substantial rights, not to maintain theories."). It should then hold Ms. Knick's takings claim ripe under the proper inquiry and remand for further litigation in federal court.

CONCLUSION

The Court should overrule *Williamson County*'s state litigation requirement, vacate the judgment below and remand for further proceedings.

DATED: May, 2018.

Respectfully submitted,

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